STATE OF MICHIGAN

IN THE SUPREME COURT

JAMES D. KUENNER,
Personal Representative of the,
ESTATE OF ADAM W. KUENNER,
Plaintiff-Appellant,

v.

FREDERICK BRETON,
Personal Representative of the
ESTATE OF CURTIS J. BRETON,
HB RESORT ENTERPRISES, INC.,
a Michigan Corporation, a/k/a
THE EAGLES NEST,

Defendants

and BEACH BAR, INC.,
a Michigan Corporation, a/k/a THE BEACH BAR,
Defendant-Appellee.
_____/

Supreme Court
Case No. 127703

Court of Appeals
Case No. 247974

Jackson County Circuit Court
Case No. 01-6423-NI

THE ESTATE OF LANCE NATHAN REED,
by and through its Personal Representative,
LAWRENCE REED,
Plaintiff-Appellant,
v.

THE ESTATE OF CURTIS JASON BRETON,
by and through its Personal Representative,
FREDERICK BRETON, and HB RESORT
ENTERPRISES, INC., a Michigan Corporation,
a/k/a THE EAGLES NEST,
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Case No. 01-4350-NI

DEFENDANT-APPELLANT BEACH BAR INC.'S
REPLY BRIEF ON APPEAL

PROOF OF SERVICE

GARAN LUCOW MILLER, P.C.
MEGAN K. CAVANAGH (P61978)
KENNETH V. KLAUS (P42509)
Attorneys for Defendant-Appellant
1000 Woodbridge Street
Detroit, MI 48207-3192
Telephone: (313) 446-5549

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KENNETH V. KLAUS (P42509)
Attorneys for Defendant-Appellant
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Detroit, MI 48207-3192
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Contrary to Plaintiffs' statements in their appellee brief, Defendant-Appellant Beach Bar Inc., has never argued that the statutory presumption of non-liability, properly construed and applied, affords it absolute immunity from suit. Defendant does not, by any means, dispute that any licensee entitled to the statutory presumption of non-liability may in fact be held liable, should it be proven that the licensee has violated the Dram Shop Act. Therefore the only question at issue in this case is what evidence must a plaintiff present in order to establish that the second-to-last licensee in fact violated the statute. The clear language of the statute evidences that the Legislature intended to impose liability only upon a showing of *visible* intoxication.

It is Defendant's position that the courts of this state, consistent with the language employed by the Legislature, should require those plaintiffs seeking to impose liability on such licensees to actually proffer evidence that the licensee was presented with, and failed to recognize, objective signs of intoxication before having served the individual in question. Plaintiffs and the Court of Appeals, on the other hand, urge this Court to ignore the Legislature's requirement of *visible* intoxication and instead contend that evidence of intoxication alone is sufficient. The Court of Appeals erred in holding that expert opinions, rendered not upon review of actual observational evidence (and, in this case, contrary to such evidence) but upon mere quantitative evidence of intoxication, are sufficient to impose liability on the Beach Bar, despite the presumption that it did not serve Mr. Breton alcohol

at a time when an ordinary observer would have reasonably believed him to be visibly intoxicated. The lack of actual evidence of Mr. Breton's *visible* intoxication does not justify the Court of Appeals' imposition of a lessened evidentiary burden - it does, however, justify summary disposition of Plaintiffs' claim against the Beach Bar in this case.

The lack of actual evidence of Mr. Breton's visible intoxication is evident upon review of the parties' appellate briefs. Defendant presented in its appellant brief a concise and fair statement of the material facts of this case, both favorable and unfavorable. In contrast, Plaintiffs' recitation of the facts omitted material facts which are relevant to the issues before this Court.[1] Specifically, the statement of facts submitted by Plaintiffs omits any reference to the portions of John Marsh's, Carl Michael Hendges', Robert Potts' and Diana Potts' testimony wherein these eye-witnesses testified that they actually observed Mr. Breton either at or after the time of service at the Beach Bar and affirmatively stated that Mr. Breton did not appear to them to exhibit objective signs of intoxication. Deposition of John

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[1]One of the issues on appeal is the strictly legal issue regarding the proper evidentiary standard to be applied to the statutory presumption under the Dram Shop Act. Resolution of this issue is not factually dependent and Defendant contends that the circuit court properly held that Plaintiffs were required but failed to present positive, unequivocal, strong and credible evidence of Mr. Breton's visible intoxication in order to properly rebut the presumption. However, Defendant has also argued that, even assuming the Court of Appeals applied the proper evidentiary standard of competent and credible evidence, the circumstantial evidence presented by Plaintiffs in this case was not sufficient to satisfy even this lesser evidentiary standard. Accordingly, Plaintiffs' omission or mischaracterization of material facts in this case is relevant to the propriety of the Court of Appeals' decision holding that the circumstantial evidence in fact produced by Plaintiffs was sufficient to rebut the statutory presumption and defeat summary disposition.

Marsh, (**21a-22a, 24a-25a, 26a-28a**); deposition of Carl Michael Hendges, (**41a**); deposition of Robert Potts, (**45a**); deposition of Diana Potts, (**47a**); deposition of Lindsay Mizerik, (**35a-38a**). The omission of such testimony is relevant to the issue presented to this Court - namely, whether the Court of Appeals clearly erred in holding that the circumstantial evidence offered by Plaintiffs - Mr. Marsh's testimony regarding his assumption as to how Mr. Breton felt and the opinions of two alleged toxicologic experts - was sufficient to rebut the statutory presumption in light of the testimony of numerous eye-witnesses who did not observe Mr. Breton to exhibit objective signs of intoxication.

Plaintiffs' answer also mischaracterizes the evidence presented in the circuit court in that Plaintiffs state that it "was determined" that Mr. Breton consumed "24-25 beers." See appellee brief, pages 3, 4. The figure of "24-25 beers" was never determined to be fact in the trial court but was, instead, proposed as an opinion by alleged expert Dr. Gunaga, based on his analysis of Mr. Breton's blood alcohol content after the accident and an estimation of 9 hours of drinking. The opinions offered by Plaintiffs' alleged experts were not based on actual observation of Mr. Breton or upon review of the testimony of fact-witnesses. The testimony of fact-witnesses, in contrast, indicates that Mr. Breton was actually observed to have consumed far less than the 24-25 beers posited by the alleged experts.[2] Again, this

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[2]A liberal construction of Mr. Marsh's testimony indicates that Mr. Breton consumed closer to 11-12 beers in the eight-hour period of time prior to the time of last service by the Beach Bar - one to two beers at the Firehouse Pub while eating lunch (**10a-13a**); two beers while at Mr. Marsh's inlaws (**10a-13a**); 2/3 of a pitcher of beer at the Beach Bar between approximately 4:45 and 6:00 or 6:15 p.m. (**15a-18a**); two beers while

mischaracterization of the evidence presented in the lower courts is significant and relevant to this Court's determination of the correctness of the Court of Appeals' decision regarding the sufficiency of the circumstantial evidence presented by Plaintiffs in the circuit court. While this Court, like the lower courts, is required to view all evidence in the light most favorable to Plaintiffs, it is not required to find that it "was determined" that Mr. Breton consumed as many beers as Plaintiffs' experts suggested he likely did. Viewing the evidence in the light most favorable to Plaintiffs, Plaintiffs can only represent that Mr. Breton was actually observed to have consumed approximately 11-12 beers but may have consumed as many as 24-25 beers in the eight hour period prior to him leaving the Beach Bar. It is Defendant's position that the circuit court properly viewed the evidence in the light most favorable to Plaintiffs and properly held that this evidence was not sufficient to rebut the statutory presumption of non-liability or defeat summary disposition.

Plaintiffs also improperly claim that they presented sufficient circumstantial evidence of Mr. Breton's visible intoxication in the form of lay witness testimony. Specifically, Plaintiffs claim that the testimony of Mr. Marsh, his wife Tracey Marsh, Chief Hendges and Ms. Mizerik[3] constitutes evidence of Mr. Breton's visible intoxication sufficient to rebut the

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waiting for the babysitter at Mr. Marsh's house (**15a-18a**); and two beers while eating a pizza at the Beach Bar between approximately 7:30 or 8:00 and 9:00 p.m. (**19a-20a**).

[3]Plaintiffs' answer incorrectly suggests that Ms. Mizerik testified that Mr. Breton had consumed 24-25 beers but still did not appear to be visibly intoxicated. A review of Ms. Mizerik's deposition evidences that she did not serve Mr. Breton anywhere close to 24-25 beers nor did she possess any knowledge that he had consumed as much. Ms. Mizerik actually testified that she served Mr. Breton and his two companions two or

statutory presumption under the standard applied by the Court of Appeals.[4] As with Mr. Marsh's testimony regarding the effects of alcohol which he felt upon leaving the Beach Bar, the lay witness testimony offered by Plaintiffs in their appellee brief does not rebut the statutory presumption of non-liability under either the proper evidentiary standard applied by the circuit court or the evidentiary standard applied by the Court of Appeals. Specifically, Plaintiffs rely upon a portion of Mr. Marsh's testimony wherein he testified that, later in the evening, his wife kicked him out of the house in anger for being intoxicated and being out instead of being home with his kids. While this testimony may constitute circumstantial evidence of Mr. Marsh's visible intoxication almost two hours after having last been served at the Beach Bar, it does not tend to prove that Mr. Breton would have more likely than not been exhibiting objective signs of intoxication at the time he was served alcohol at the Beach Bar. Likewise, Chief Hendge's testimony that Mr. Marsh appeared visibly intoxicated approximately two and one-half hours after having been served by Defendant does not tend to prove that the Beach Bar violated the Dram Shop statute by serving Mr. Breton alcohol

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three pitchers of beer and it did not appear to her that Mr. Breton had consumed alcohol prior to arriving at the Beach Bar. (**16a-17a**).

[4]As to lay witness testimony, the Court of Appeals relied only upon the portion of Mr. Marsh's testimony wherein he testified that, at the time he was leaving the Beach Bar at around 9:00 p.m., he "could tell [he] had been drinking" and believed that Mr. Breton probably did as well. As explained in Defendant's appellant brief, Mr. Marsh's testimony, properly construed, cannot constitute credible or competent evidence of Mr. Breton's visible intoxication as it does not tend to prove that Mr. Breton was exhibiting signs or symptoms from which an ordinary observer would conclude that he was not sober at the time and the place the Beach Bar provided him with alcohol.

at a time when he objectively appeared to be intoxicated. Similar to the testimony relied upon by the Court of Appeals, the lay witness testimony offered by Plaintiffs in their appellee brief is not sufficient to rebut the statutory presumption of non-liability under any evidentiary standard.

In addition to mischaracterizing the facts in this case, Plaintiffs have also misrepresented the law. Plaintiffs cite *McKenzie v Estate of Taft*, 434 Mich 858; 450 NW2d 266 (1990) and claim that "this Court held that the jury would have been justified in disbelieving the testimony of 6 persons, including club employees and friends, who claimed that the person at issue was not visibly intoxicated, given that he had consumed 10 beers while playing 18 hours of golf, drank 2 mixed drinks on the 19th hole and had drank at lunch before the golf game even began." Appellee brief, at n 10, page 26. However, this Court did not hold as claimed by Plaintiffs but instead, denied leave to appeal because it was not persuaded that the questions presented by the unsuccessful plaintiff should be reviewed by this Court. 434 Mich 858. Plaintiffs' statement is not taken from this Court's holding but rather from Justice Levin's dissent from the Court's denial of leave. In denying leave in *McKenzie, supra*, this Court upheld the Court of Appeals' unpublished decision affirming summary disposition to the dramshop defendant. Accordingly, Plaintiffs' reliance upon *McKenzie, supra* is misplaced and does not support the Court of Appeals' decision in this case.

Plaintiffs cite *Arciero v Wicks*, 150 Mich App 522; 389 NW2d 116 (1986) for the proposition that Michigan Courts do not require that an AIP exhibit physical signs of intoxication in order for a court or jury to find evidence of visible intoxication under the statute. However, the presence or absence of physical signs of the AIP's intoxication was not at issue in *Arciero* and the *Arciero* Court's statement was merely dicta, contained in a footnote. *Id* at 530, n 3. Moreover, even the *Arciero* Court recognized that some "external manifestation" of intoxication necessarily was required in to establish that an AIP was visibly intoxicated. In the instant case, not one witness presented any evidence that Mr. Breton exhibited any "external manifestation" of intoxication at or near the time of service at the Beach Bar. Further, the expert affidavits presented by Plaintiffs did not provide any evidence of that Mr. Breton externally manifested, by visual means or otherwise, his level of alleged intoxication at the relevant point of service. Accordingly, *Arciero* does not support Plaintiffs' argument that the expert testimony presented in this case was sufficient to rebut the statutory presumption of non-liability.

Plaintiffs also rely on *Lasky v Baker*, 126 Mich App 524; 337 NW2d 561 (1983) for the proposition that circumstantial evidence is sufficient to establish that an AIP was visibly intoxicated at the time of service. However, *Lasky* does not support Plaintiff's contention. As an initial matter, the *Lasky* decision did not have anything to do with the sufficiency of expert testimony in proving visible intoxication. Further, the *Lasky* Court incorrectly failed to recognize that the AIP's "visible" intoxication was a required element of a claim under

the Dramshop Act. Instead, the *Lasky* Court focused only on the "intoxication" of the AIP and stated that the four elements necessary to establish a claim under the act included: "(1) the immediate tortfeasor was an intoxicated person; (2) the defendant bar, or one of its agents, sold intoxicating liquors to the tortfeasor; (3) as a result of such sale, the tortfeasor continued in an intoxicated condition until the time of the accident; and (4) such intoxication was the cause or contributing cause of the plaintiff's injury." *Id* at 529, citing, *Pesola v Pawlowski,* 45 Mich App 516, 518-519, 206 NW2d 780 (1973). Thus, despite the statute's clear requirement that a plaintiff prove that an AIP was visibly intoxicated when he or she was served alcohol by the defendant, the *Lasky* Court did not recognize this requirement or decide what evidence was sufficient to establish same. Moreover, *Lasky* is distinguishable from the instant case, because the plaintiff in *Lasky* presented her own actual observation testimony, as well as the actual observation testimony of her husband, in support of her claim that the AIP was intoxicated.[5] Accordingly, Plaintiffs' reliance on *Lasky* is misplaced.

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[5]Although the *Lasky* Court erroneously failed to examine whether the plaintiff could present evidence of the AIP's visible intoxication, the plaintiff's testimony, and that of her husband, would have at least raised a question of fact as to whether the AIP was visibly intoxicated (although *after* the point of service). The plaintiff testified that the AIP was staggering, that he had difficulty opening the door to his car, that his eyes were glazed, that his speech was slurred and that he was mumbling. The plaintiff's husband likewise testified that the AIP was staggering and could not walk in a straight line as he exited the bar and that he, the husband, could smell whiskey and beer on the AIP's breath. In contrast to such evidence of the AIP's "external manifestation" of intoxication in *Lasky*, the evidence presented by Plaintiffs in the instant case clearly was insufficient to establish intoxication, let alone visible intoxication.

For these reasons, as well as those stated in Defendant's appellant brief, the Court of Appeals clearly erred in reversing the circuit court in this case and holding that the circumstantial evidence of Mr. Breton's visible intoxication submitted by Plaintiffs was sufficient, in light of actual observational testimony to the contrary, to rebut the statutory presumption of non-liability and defeat summary disposition. In so holding, the Court of Appeals has effectively written the statutory presumption out of existence and allowed Plaintiffs to present merely prima facie evidence of intoxication in order to impose liability against any licensee in the chain of service, despite the Legislature's intent to increase Plaintiffs' burden of production on this issue and require actual evidence of Mr. Breton's *visible* intoxication. Accordingly, Defendant respectfully requests that this Court reverse the Court of Appeals' decision in this case and dismiss Plaintiffs' complaint.

GARAN LUCOW MILLER, P.C.
Attorneys for Defendant-Appellant

By: _____
MEGAN K. CAVANAGH (P61978)
KENNETH V. KLAUS (P42509)
1000 Woodbridge Street
Detroit, MI 48207-3192
Telephone: (313) 446-5549

Date: February 6, 2006